

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA**

MINUTE ORDER

DATE: 08/01/2016

TIME: 04:00:00 PM

DEPT: 43

JUDICIAL OFFICER PRESIDING: Kevin DeNoce

CLERK: Tiffany Froedge

REPORTER/ERM:

CASE NO: **56-2015-00465460-CU-BC-VTA**

CASE TITLE: **Aerovironment Inc vs. Torres**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

EVENT TYPE: Ruling on Submitted Matter

APPEARANCES

The Court, having previously taken the Motion to Quash under submission, now rules as follows:

Grant Defendants' Motion to Quash the Notice of Videotaped Depositions of Katie McAllister and Shannon Benbow.

Discussion:

Were non-witnesses Ms. McAllister and Ms. Benbow properly served?

It is undisputed that both Ms. McAllister and Ms. Benbow are non-party witnesses, Washington state residents (as well as the wives of two named defendants, Justin McAllister and Gabriel Torres, respectively.) In the Reply, page 5, lines 8-19, Defs contend that Plaintiff failed to comply with the procedural requirements of either California or Interstate Depositions and Discovery Act because Plaintiff did not provide a deposition subpoena. According to moving defs, since Ms. McAllister and Ms. Benbow are not parties to the action, CCP 2026.010(c) as well as the Uniform Interstate Deposition and Discovery Act ("UIDDA") requires PI to issue and serve a deposition subpoena from the state where the deposition is to be held. Defs contend that PI has failed to do either. Instead, Defs contend that PI merely provided Notices of Depositions for both witnesses, which is procedurally deficient (and also contends that PI further mischaracterizes these notices in its Opposition, referring to them as "deposition subpoenas") (See Opposition, page 6, lines 13-14.) Therefore, in addition to being substantively deficient, Defs contend that the depositions are procedurally invalid.

AV contends that the subpoenas were properly served. They point to page 5, lines 8-19 of the reply, where defs claim AV never served Washington deposition subpoenas on Katie McAllister or Shannon Benbow. AV contends that def's moving papers belies their position. In the motion, Page 4, lines 5, Defs state that "Plaintiff refuses to withdraw the subpoenas", declarations of Katie McAllister (page 2, lines 11-12 – "I was served with a copy of the Notice of Videotaped Deposition of Katie McAllister and Shannon Benbow and the deposition subpoena on June 3, 2016") and Shannon Benbow (page 2, lines 11-13 – "I was served with a copy of the Notice of Videotaped Depositions of Katie McAllister and Shannon Benbow and the deposition subpoena on June 8, 2015, at approximately 10:30 a.m. in Seattle, Washington.") [emphasis added.] See also, Crain declaration, ¶¶ 3-6, Ex. A, B, C, D.

CCP section 2026.010(c) provides:

"(c) If the deponent is not a party to the action or an officer, director, managing agent, or employee of a

party, a party serving a deposition notice under this section shall use any process and procedures required and available under the laws of the state, territory, or insular possession where the deposition is to be taken to compel the deponent to attend and to testify, as well as to produce any document, electronically stored information, or tangible thing for inspection, copying, testing, sampling, and any related activity."

CCP section 2026.010(c) applies since the depositions are to be taken in Seattle, Washington.

Spousal Privilege.

Defendants move to quash deposition notices/subpoenas on Katie McAllister and Shannon Bendow, wives of Defendants, on spousal privilege grounds. Plaintiffs rule out any questioning of these non-party witnesses as to confidential communications. As such, the issue is whether *Evidence Code* section 971 precludes McAllister and Benbow from being called as adverse witnesses? *Evidence Code* section 973, subdivision (b) provides an exception to section 971 "in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse." The scope and meaning of the "immediate benefit" exception have yet to be fully defined. Compare *Duggan v. Superior Court*, 179 Cal. Rptr. 410, 413 (Ct. App. 1981) (holding that community property recovery is not immediate benefit to witness spouse) with *Hand v. Superior Court*, 184 Cal. Rptr. 588, 591-92 (Ct. App. 1982) (holding that community property recovery is immediate benefit to witness spouse). The landscape was more recently described as follows:

"Evidence Code section 973, subdivision (b) precludes a married person from asserting the marital privilege in a civil proceeding which he or she brings or defends for the 'immediate benefit' of his or her spouse or of both spouses jointly. In an action defended for the 'immediate benefit' of a spouse, 'the liability must be immediate and direct' for the waiver to apply. (Waters v. Superior Court (1962) 58 Cal.2d 885, 897 [27 Cal. Rptr. 153, 377 P.2d 265].) As recognized by the Rutter guide, 'there is conflicting authority on how this 'immediate benefit' test should be applied ...' in cases involving a benefit to the spouses' community property interest. (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2011) ¶ 8:2342, p. 8E-108 (rev. # 1, 2002) (hereafter guide).) According to the guide, under the first view, the 'immediate benefit' condition is arguably satisfied 'where the proceeds of a lawsuit brought by a married person would be community property; or, conversely, where the spouses' community property is at risk in a lawsuit brought against a married person.' (Guide, ¶ 8:2343, pp. 8E-108 to 8E-109 (rev. # 1, 2002).) The guide explains, 'This is the view taken by at least one court in connection with a spouse's suit for personal injury damages: [¶] Personal injury damages recoveries are generally community property if the cause of action arose during marriage (Fam.C. § 780); thus, in a married person's suit to recover damages for personal injuries sustained during marriage, the noninjured spouse has a direct interest in the outcome and the privilege is waived.' (Guide, ¶ 8:2344, p. 8E-109 (rev. # 1, 2002), citing Hand v. Superior Court (1982) 134 Cal.App.3d 436, 442 [184 Cal. Rptr. 588].) Under the alternative view, however, 'an 'immediate benefit' waiver is triggered only if the married person would obtain a benefit from his or her spouse's litigation because of a right which the married person holds directly and not simply because of a potential community property interest in any recovery the spouse might obtain.' (Guide, ¶ 8:2345, p. 8E-109 (rev. # 1, 2002), citing Duggan v. Superior Court (1981) 127 Cal.App.3d 267, 270-272 [179 Cal. Rptr. 410].)"

(*Diepenbrock v. Brown* (2012) 208 Cal. App. 4th 743, 748.)

The official comment to section 973 provides as follows:

"This subdivision precludes married persons from taking unfair advantage of their marital status to escape their duty to give testimony under Section 776 It recognizes a doctrine of waiver that has been developed in the California cases... . This principle of waiver has seemingly been developed by the case law to prevent a spouse from refusing to testify as to matters which affect his own interest on the ground that such testimony would also be 'against' his spouse."

The *Duggan* case relied upon by Defendants, applied a narrow interpretation to the phrase "for the immediate benefit of the spouse." In *Duggan*, defendants sought to depose a wife whose husband was

suing them to dissolve a partnership. Since any assets that the husband obtained upon dissolution of the partnership would be community property, the defendants claimed that the husband had "brought" the suit in part "for the immediate benefit" of the wife. The court noted that the wife had no present interest in the partnership assets. It ruled that her potential community property interest was not "immediate" within the meaning of Evid Code 973(b).

Plaintiff relies on *Hand v. Superior Court (Boles)* (1982) 134 Cal.App.3d 436, 441, where the court considered whether a husband's personal injury action was a proceeding for the "immediate benefit of the wife." The court held that it was, because any recovery would be community property, to which the wife had a "present interest and entitlement to a share." (*Id.* at 442.) AV contends there here, its claim against defendants Torres, McAllister and the business they created directly affect Ms. Benbow's and Ms. McAllister's community property interests, and they certainly have a "present interest and entitlement" in retaining the value of that business. AV contends that the fact that defs moved to Washington State does not change Ms. Benbow's or Ms. McAllister's ongoing community property interest. AV cites authority that some nine states, including California and Washington, have adopted the community property system. (See opposition, page 7, fn 1, citing Internal Revenue Manual, part 25, Ch. 18, Section 1.2.2.)

It should be noted that *Hand v. Superior Court, supra*, was a personal injury action wherein Plaintiff's wife was deposed. The court in *Hand* framed the issue as follows:

"We turn to the question whether the husband's personal injury action is a proceeding for the "immediate benefit" of the wife. We conclude that it is. The leading case of *Waters v. Superior Court* (1962) 58 Cal.2d 885, 897 [27 Cal.Rptr. 153, 377 P.2d 265], interpreting Code of Civil Procedure section 2019, subdivision (a)(4), says that "'immediate benefit'" means "an immediate right to the amount recovered or some portion of it as soon as it was recovered by the nominal plaintiff." (*Italics added.*) (Accord, *Southern California Edison Co. v. Superior Court, supra*, 7 Cal.3d at p. 839 ["There is probably no better way to construe 'immediate benefit' than as an immediate share in the recovery."]; see also *Freeman v. Jergins* (1954) 125 Cal.App.2d 536 [271 P.2d 210] [interpreting the phrase in then Code Civ. Proc., § 2055 (now *Evid. Code*, § 776, subd. (d)(1))].)"

(*Hand v. Superior Court, supra*, 134 Cal. App. 3d at p. 439.)

This court concludes that the potential community property interests of Katie McAllister and Shannon Bendow are not "immediate" within the meaning of section 973(b). It cannot be said that the defense of this action is for the "immediate benefit" of Katie McAllister and Shannon Bendow. As such, the exception set forth in section 973 does not apply, the spousal privilege in section 971 may be asserted, and the deposition notices/subpoenas are ordered quashed.

Washington law, 5.60.060 provides, in relevant part:

A spouse or domestic partners shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or domestic partnership. The above creates two distinct privileges and both bars one spouse from testifying against the other (the broader marital testimonial privilege) and protects confidential communications between spouses (the confidential communications privilege.) (See *Barbee v. Luong Firm, P.L.L.C.*, 126 Wn. App. 148, 155-156 (Wash. Ct. App. 2005).

The marital testimonial privilege, unless waived, allows the communicating spouse to prevent the hearing or receiving spouse from being called as a witness on any topic without her consent. (*Id.* at 157.) The marital privilege says, in effect, that no spouse shall be examined as a witness for or against

the other spouse without the consent of such other spouse. (*Swearingen v. Vik*, 51 Wn2d 843, 847 (1958.)) Once the privilege is asserted, one spouse is then incompetent to testify for or against the other as to all matters, and the restriction is not limited merely to confidential communications between them. (*State v. Tanner*, 54 Wn.2d 535, 537 (1959.)

Which state's law applies?

In the moving papers, defs cite California and Washington State law on spousal privilege as justification to quash the subpoenas. Defendants rely upon Evidence Code section 970 and 971, as well as Washington RCW 5.60.060. PI contends that Washington law does not apply at all, because this is a CA case, and all events at issue occurred in CA. Since both California and Washington law preclude calling Katie McAllister and Shannon Bendow as witnesses, the issue as to which law applies is inconsequential to the court's ruling.

Notice to be given by the clerk.